Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1998

LEVENE & EISENBERG, a Professional Corporation,

*Petitioner,*

v.

GOLD COAST ASSET ACQUISITION, L.P.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Did the Ninth Circuit err when it expanded this Court's holding in Dewsnup v. Timm, a case arising under chapter 7 of the Bankruptcy Code whose holding was specifically limited to its facts, to apply to chapter 11 cases in conflict with the holding of the Tenth Circuit in Wade v. Bradford?

Did the Ninth Circuit err when it ignored the bifurcation of an undersecured claim into secured and unsecured elements, in conflict with the plain language of sections 506(a) and 349(b) of the Bankruptcy Code which specifies when an undersecured claim is bifurcated and when the lien on the unsecured portion of such a claim is restored?

Did the Ninth Circuit err when it failed specifically to remand the matter to the Bankruptcy Court to consider whether Petitioner would have otherwise been entitled to the relief it sought under the "equities of the case" provision of 11 U.S.C. § 552(b) in conflict with the holding of the Fourth Circuit in United Virginia Bank v. Slab Fork Coal Company?

## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Supreme Court Rule 14.1(b)

Levene & Eisenberg,
a Professional Corporation

Gold Coast Asset Acquisition, L.P.

1441 Veteran Street Co.,
a California Limited Partnership

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## CITATIONS TO THE CASE AND STATEMENT OF JURISDICTION

Supreme Court Rules 14.1(d) and 14.1(e)

1. Gold Coast Asset Acquisition, L.P. v. Levene & Eisenberg, a Professional Corporation (In re 1441 Veteran Street Co.), 154 F.3d 1103 (9th Cir. 1998).

2. Gold Coast Asset Acquisition, L.P. v. Levene & Eisenberg, a Professional Corporation (In re 1441 Veteran Street Co.), 144 F.3d 1288 (9th Cir. 1998).

The Ninth Circuit issued its opinion in this matter on July 15, 1998 with the citation listed as #2 above, a copy of which is attached as Exhibit "A" to the Appendix hereto. The Petitioner filed a motion for rehearing which was denied on September 10, 1998, and the Ninth Circuit amended its opinion on that date with the citation listed as #1 above, a copy of which is attached as Exhibit "B" to the Appendix. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED IN THIS CASE

Supreme Court Rule 14.1(f)

Full Text Included In Appendix, Exhibit "G"

11 U.S.C. § 349(b)

11 U.S.C. § 502(b)

11 U.S.C. § 506(a)

11 U.S.C. § 506(d)

11 U.S.C. § 552(b)

11 U.S.C. § 1111(b)

Federal Rule of Bankruptcy Procedure 3012

## STATEMENT OF THE CASE

Supreme Court Rules 14.1(g) and 14.1(h)

### I. INTRODUCTION

On Petition for Certiorari is an amended decision from the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit"). The Ninth Circuit heard the case on appeal from the United States District Court for the Central District of California (the "District Court") pursuant to 28 U.S.C. § 158(d). The District Court had jurisdiction over the appeal from the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") pursuant to 28 U.S.C. § 158(a).

The Petitioner, Levene & Eisenberg, a Professional Corporation ("L&E"), was the court-approved counsel for a chapter 11 debtor, 1441 Veteran Street Co. ("1441"). Gold Coast Asset Acquisition, L.P. ("Gold Coast"), a "vulture fund", was 1441's primary secured creditor. Pursuant to the plain language of the Bankruptcy Code,[1] upon the commencement of the bankruptcy case, Gold Coast's undersecured claim[2] was bifurcated into two separate claims, one secured and the other unsecured. No plan of reorganization was confirmed, but during the

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[1]Unless otherwise specified, all statutory references herein are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

[2]Undersecured claims exist where the value of the encumbered collateral that secures a creditor's claim is less than the total amount of the claim.

pendency of the case Gold Coast received more than the amount of its secured claim. Therefore, when the Bankruptcy Court approved an award of $100,000 to L&E in compensation for its legal services, L&E's administrative priority claim took priority over Gold Coast's remaining unsecured claim, and was satisfied out of rents that had been collected from 1441's primary asset, an apartment building which had been encumbered by Gold Coast's lien. The Bankruptcy Court's order was affirmed by the District Court.

The Ninth Circuit committed clear error when it reversed the decision of the courts below. First, the Ninth Circuit erroneously expanded the holding of this Court in Dewsnup v. Timm, a chapter 7 case which was specifically limited to its facts, in conflict with the rulings of the Tenth Circuit in Wade v. Bradford and other courts which have held that Dewsnup does not apply to chapter 11 cases. Second, the plain language of the Bankruptcy Code provides that an undersecured claim is bifurcated upon the commencement of a chapter 11 case into separate secured and unsecured claims, and that even when no plan of reorganization is confirmed and the case is ultimately dismissed, this bifurcation is only undone upon the actual dismissal of the case.

The Ninth Circuit, however, contrary to the plain language of the Bankruptcy Code and in conflict with decisions of other courts across the nation, refused to recognize this bifurcation and erroneously treated Gold Coast's lien as preserved in its pre-bankruptcy form throughout 1441's bankruptcy case. Third, the Ninth Circuit erred when it failed specifically to remand this proceeding to the Bankruptcy Court to consider whether L&E was otherwise entitled to the relief it had obtained under the "equities of the case" provision of 11 U.S.C. § 552(b), when that argument had originally been made to the Bankruptcy Court but no finding or ruling on that argument had ever been issued due to the ruling in favor of L&E on other grounds by both the Bankruptcy Court and the District Court. For these reasons, this Court should issue a writ of certiorari to the Ninth Circuit and grant proper relief to L&E.

## II. FACTS OF THE CASE

1441's primary asset was a multi-unit apartment building in Los Angeles (the "Property"). Although 1441 had previously owned and sold the Property, 1441 reacquired the Property in January 1994 through a foreclosure sale on its junior deed of trust when the purchaser was in default to both 1441

and the primary lender, California Federal Bank ("CalFed"). 1441 immediately attempted to negotiate regarding the purchaser's prior defaults, but CalFed's note by then had been purchased by Gold Coast, a "vulture fund" known for investing in distressed assets. Gold Coast purchased the $12-million CalFed note for only $7.5-million, 62% of its face value. Gold Coast rejected all of 1441's offers, immediately set a hearing for the appointment of a receiver, and noticed a non-judicial foreclosure sale of the Property for February 17, 1994. Left with no alternatives, 1441 filed a chapter 11 petition on January 28, 1994 in the Bankruptcy Court, only three weeks after it had regained control over the Property. L&E was subsequently approved by the Bankruptcy Court as 1441's bankruptcy counsel, to be compensated from the assets of 1441's bankruptcy estate.

Over the course of 1441's chapter 11 case, 1441 paid to Gold Coast approximately $265,000 in rents collected from the Property, pursuant to a cash collateral stipulation between the parties. On September 7, 1994, on 1441's motion, the Bankruptcy Court held a hearing, pursuant to Fed. R. Bankr. P. 3012, to value Gold Coast's secured interest in the Property. At the hearing, 1441 argued for a valuation

of $8.45-million, and Gold Coast for $10.39-million. The Bankruptcy Court found that the Property, and thus Gold Coast's allowed secured claim, had a value of $10.1-million, thereby leaving the balance of Gold Coast's claim unsecured pursuant to 11 U.S.C. § 506(a). Gold Coast never appealed this ruling, never elected to have its entire claim treated as secured pursuant to 11 U.S.C. § 1111(b), and never moved the Bankruptcy Court to vacate and/or modify its valuation of the Property.

Previously, 1441 had propounded a plan of reorganization, and September 13, 1994 had been set as the date for the confirmation hearing. Upon consideration of Gold Coast's votes to reject the Plan, both in its capacities as a secured creditor and an unsecured creditor on account of Gold Coast's bifurcated undersecured claim, the Bankruptcy Court denied confirmation of the plan and granted Gold Coast relief to foreclose against the Property. Gold Coast did not request that the Bankruptcy Court dismiss 1441's chapter 11 case or convert it to one under chapter 7 of the Bankruptcy Code. On November 23, 1994, Gold Coast installed a receiver to collect the rents from the Property, and on December 20, 1994, Gold Coast purchased the Property, at its

non-judicial foreclosure sale, for a "credit-bid" of $10-million.

On January 31, 1995, a final hearing was held on L&E's application to the Bankruptcy Court for award of its fees and costs incurred as an administrative expense of 1441's bankruptcy estate. At that hearing, the Bankruptcy Court awarded L&E $100,000 in compensation.

After the loss of the Property, 1441's estate still included some $270,000 in collected rents excluding tenant deposits. At the January 31, 1995 hearing, the Bankruptcy Court specifically ruled that Gold Coast's $10.1-million secured claim had been fully satisfied by the $265,000 in payments that 1441 had made during the chapter 11 case and Gold Coast's $10-million credit-bid to purchase the Property. Gold Coast therefore was left with only an unsecured claim in the case, subordinate in priority to L&E's administrative claim. The Bankruptcy Court, therefore, entered an order on March 8, 1995 directing that L&E receive $100,000 from the funds being held. 1441's chapter 11 case was subsequently dismissed on its own motion, and the balance of the funds held were paid to Gold Coast.

Gold Coast appealed from the March 8, 1995 order, but the District Court specifically affirmed the

order on all of its legal premises. Gold Coast then appealed to the Ninth Circuit. In its July 15, 1998 opinion, the Ninth Circuit held that the Bankruptcy Court's valuation of the Property was "irrelevant", that Gold Coast's claim had never been bifurcated because the chapter 11 case ultimately "failed", and that all of the cash held by the receiver was subject to Gold Coast's lien. The Ninth Circuit specifically relied upon this Court's holding in Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) to justify its refusal to recognize the bifurcation of Gold Coast's claim and the limitation of Gold Coast's lien rights during the pendency of 1441's chapter 11 case.

The Ninth Circuit also failed specifically to remand this matter to the Bankruptcy Court for consideration of whether L&E was otherwise entitled to the relief that it had obtained under the "equities of the case" provision of 11 U.S.C. § 552(b). The Ninth Circuit's July 15, 1998 opinion incorrectly stated that this argument was being raised for the first time on appeal. In response, L&E petitioned the Ninth Circuit for a rehearing. In addition to arguing that the Ninth Circuit's holdings with regard to the bifurcation and satisfaction of Gold Coast's claim were incorrect, L&E also noted that L&E had

presented the "equities" argument to the Bankruptcy Court prior to the March 8, 1995 order, but that no ruling had been made on that argument. Further, as the prevailing party below, L&E was entitled to raise any argument, even for the first time, that would justify affirmance of the order on appeal.

On September 10, 1998, the Ninth Circuit denied L&E's petition for rehearing, and amended the July 15, 1998 decision by deleting its references to L&E having raised the "equities" argument for the first time on appeal. Rather, the Ninth Circuit stated that "L&E points to insufficient facts to justify application of the exception and the bankruptcy court made no finding that would support the application." This petition for a writ of certiorari followed.

## III. ARGUMENT

### A. The Ninth Circuit Erred In Expanding This Court's Holding In Dewsnup To Chapter 11 Cases In Conflict With This Court's Prescriptions In Dewsnup And The Holding Of The Tenth Circuit In Wade v. Bradford

The Ninth Circuit's first error was its undue expansion of this Court's Dewsnup decision. The Dewsnup case involved a woman who went through a chapter 7 liquidation proceeding. She owned a piece of real estate, worth $39,000, which passed through the bankruptcy case and was returned to her. The debtor then argued that section 506(a) acted to bifurcate the secured creditor's claim, a total of approximately $120,000, into secured and unsecured portions, and that therefore the real property was only subject to a lien (post-bankruptcy) in the amount of $39,000. This Court, however, held that the lien "passed through" the chapter 7 case in full force (so that the debtor would have to pay off the entire $120,000 claim in order to redeem the real property from the lien), because under pre-Bankruptcy Code practice, "[a]part from reorganization proceedings...no provision of the pre-

Code statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." Dewsnup v. Timm, 112 S.Ct. at 779 (emphasis added). The Dewsnup decision also limited its own application to the facts in that case: "Hypothetical applications that come to mind and those advanced at oral argument illustrate the difficulty of interpreting the statute in a single opinion that would apply to all fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day." Dewsnup, 112 S. Ct. at 778.[3]

After Dewsnup, numerous courts, including the Courts of Appeals for the Eighth and Tenth Circuits, held that the Dewsnup holding did not apply in other chapters of the Bankruptcy Code which involved the attempted reorganization of debtors' estates, as opposed to chapter 7 liquidations. *See, e.g.*, Harmon v. U.S. Through Farmers Home Administration, 101 F.3d 574 (8th Cir. 1996) (Dewsnup does not bar the "strip down" of a lien in chapter 12 farm reorganizations); Wade v. Bradford,

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[3]*See also* Dewsnup, 112 S.Ct. at 778 n.3 ("Accordingly, we express no opinion as to whether the words "allowed secured claim" have different meaning in other provisions of the Bankruptcy Code.").

39 F.3d 1126, 1128-29 (10th Cir. 1994) (Dewsnup prohibition against stripping down of lien in chapter 7 was limited to facts of case and did not apply in chapter 11 proceeding); Bank One, Chicago, NA v. Flowers, 183 B.R. 509 (N.D. Ill. 1995) (Dewsnup does not apply to chapter 13 proceedings); In re Bowen, 174 B.R. 840, 852-55 (Bankr. S.D. Ga. 1994) (Dewsnup does not apply in chapter 11); In re Dever, 164 B.R. 132 (Bankr. C.D. Cal. 1994) (Dewsnup does not apply in chapter 11). As these courts clearly understood, "Dewsnup's holding cannot be imported into chapter 11 cases without eviscerating other key provisions and principles of that reorganization chapter." Wade v. Bradford, 39 F.3d at 1129 (*quoting* In re Dever, 164 B.R. at 133).

Notwithstanding this Court's express limitation of its holding in Dewsnup to the facts of that case, and notwithstanding the holdings of numerous other courts, including the Tenth Circuit, that Dewsnup does not apply in chapter 11 cases, the Ninth Circuit, in this chapter 11 case, expressly relied upon Dewsnup to disregard the claim bifurcation provisions of section 506(a) of the Bankruptcy Code in order to reverse the decisions of the District Court and Bankruptcy Court below.

B. The Ninth Circuit Erred When It Ignored The Plain Language Of Sections 506(a) And 349(b) The Bankruptcy Code Mandating The Bifurcation Of An Undersecured Claim Into Secured And Unsecured Elements And Providing For The Restoration Of The Pre-Bankruptcy Lien On The Unsecured Portion Only Upon Dismissal Of The Bankruptcy Case

The Ninth Circuit's second error was in ignoring the plain language of the Bankruptcy Code. This Court has repeatedly ruled that when interpreting the Bankruptcy Code, "[t]he plain meaning of legislation should be conclusive" and "the sole function of the courts is to enforce it according to its terms." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42, 109 S. Ct. 1026, 1031, 103 L.Ed.2d 290 (1989).[4] In the case of Union Bank v. Wolas, 502 U.S. 151, 112 S.Ct. 527, 116 L.Ed.2d

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[4] *See, e.g.*, Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992); Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992); Connecticut National Bank v. Germain, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); United States v. Nordic Village, Inc., 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1991); Board of Governors of Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991).

514 (1991), Justice Scalia (speaking for the Court in a case also arising from the Ninth Circuit) admonished both litigants to avoid straying from this rule:

> "It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a Court of Appeals), with respect to a statute utterly devoid of language that could remotely be thought to distinguish between long-term and short-term debt. Since there was here no contention of "scrivener's error" producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable."

Union Bank v. Wolas, 112 S.Ct. at 534 (emphasis added).

In the case at bar, the Ninth Circuit (again) ignored the plain language of the relevant sections of the Bankruptcy Code. In chapter 11, unless an undersecured creditor makes the election under section 1111(b) to have its claim treated as fully secured, its claim is divided by section 506(a) into separate secured and unsecured claims. The secured claim is equal in amount to the value of the subject collateral, and the unsecured claim is in the amount of the remaining balance. The plain language of the

Bankruptcy Code mandates that this bifurcation occurs on the petition date, when the chapter 11 case commences.

This process was detailed in the case of In re Embassy Properties North, Limited Partnership, 196 B.R. 172, 174-75 (Bankr. D. Kan. 1996). As noted by the Embassy Properties court, section 502(b) directs that the amount of a claim shall be determined "as of the date of the filing of the petition". This specifically includes the bifurcated secured claim of an undersecured creditor like Gold Coast, as is stated in section 1111(b)(1)(A): "A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title..." Embassy Properties, 196 B.R. at 174-75. Therefore, from the moment that 1441 filed its chapter 11 bankruptcy petition, because it never exercised its election to be treated as fully secured under section 1111(b), Gold Coast's secured claim was limited in amount to $10.1 million, the value of its collateral.

The Ninth Circuit ignored this mandated result, noting only that 1441's bankruptcy case was ultimately dismissed and did not result in the confirmation of a plan of reorganization. This court-created "failed case" exception to the clear mandate of section 506(a) of the Bankruptcy Code is also the

basis of the Ninth Circuit's attempt to distinguish cases such as Wade v. Bradford and In re Dever, which hold that in chapter 11, undersecured claims are bifurcated and Dewsnup does not apply. Indeed, the Ninth Circuit also erred in failing to follow the plain language of section 349 of the Bankruptcy Code, which specifically provides for the time and manner of the reconstitution of a bifurcated undersecured claim where a chapter 11 case ends in dismissal.

Section 349(b) clearly states that, absent certain circumstances not relevant to this case, when a case is dismissed, liens "stripped down" from undersecured claims (due to the bifurcation of such claims in chapter 11 into secured and unsecured elements) are restored to their full effect under relevant state law, and all assets of the bankruptcy estate are revested in their pre-petition status. Therefore, when 1441's chapter 11 case was dismissed (on 1441's own motion as advanced by L&E), Gold Coast's claim was no longer bifurcated, and Gold Coast's lien attached to all subject collateral left in 1441's estate, including the collected rents then still being held by the receiver. L&E had, of course, already been paid.

Once the case was actually dismissed by order of the Bankruptcy Court, Gold Coast possessed a

single claim that was secured by a lien that encumbered, *inter alia*, all of the collected rents still in 1441's estate. *See* In re Groves, 27 B.R. 866 (Bankr. D. Kan. 1983) (creditor's security interest in debtor's assets revests in creditor after dismissal of bankruptcy case). The Ninth Circuit, however, ignored the plain language of section 349, that this effect is realized only upon the actual dismissal of the case, and not before. In a chapter 11 case, as noted above, bifurcation of undersecured claims occurs upon the filing of the petition commencing the case. Section 349 makes clear that the bifurcation is only undone upon the dismissal of the case, not when the case "fails", a term which is not defined in either the Bankruptcy Code or the relevant case law. For this reason, courts across the country have held that when a court orders assets transferred from a bankruptcy estate to a third party prior to dismissal, these assets do not revert to the debtor, and any lien otherwise reinstated does not attach to them. *See, e.g.*, In re Searles, 70 B.R. 266 (D.R.I. 1987); In re Tri-Glied, Limited, 179 B.R. 1014 (Bankr. E.D.N.Y. 1995) (only "property of the estate" determined as of date of dismissal revests under section 349); In re Sports & Science, Ind., Inc., 95 B.R. 745, 747 (Bankr. C.D. Cal. 1989) ("The legislative history clearly explains that

[section 349(b)(3)] was not intended to unwind sales to bona fide purchasers. Logically, transfers made in accordance with the Bankruptcy Code and orders of the Court would also not be unwound").

In this case, the Ninth Circuit erred because it ignored the plain language of the Bankruptcy Code, which mandates that even when a chapter 11 case is ultimately dismissed, the bifurcation of an undersecured claim in that case is only undone upon the actual dismissal of the case and not prior to that moment. The Ninth Circuit's decision, which completely ignored the interim bifurcation of Gold Coast's undersecured claim, has thus denied L&E its rights as an administrative priority claimant under the Bankruptcy Code, is in flagrant contradiction with this Court's repeated rulings on the "plain meaning" approach required in cases involving interpretation of the Bankruptcy Code, and should be reversed.

C. The Ninth Circuit Erred When It Failed Specifically To Remand This Matter To the Bankruptcy Court To Consider Whether L&E Would Have Otherwise Been Entitled To The Relief It Sought Under The "Equities Of The Case" Provision of 11 U.S.C. § 552(b).

Even if all of the collected rents held by 1441 or the receiver were fully subject to Gold Coast's lien, the Bankruptcy Court still had the authority to award L&E payments from such funds based on the "equities of the case" pursuant to 11 U.S.C. § 552(b). The legislative history of section 552(b) states that this provision represents "a critical limit" on creditors' rights "which is designed, among other things, to prevent windfalls for secured creditors and to give the courts broad discretion" to balance the rights and needs of all of the parties involved.[5] The court in In re Vanas, 50 B.R. 988 (Bankr. E.D. Mich. 1985) notes that "[t]he application of equity found in § 552(b) requires a careful analysis of the circumstances in which each case arises" and requires "a balance of the equities of each case", in which the court evaluates, among other factors, "the

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[5]Section-by-section description of H.R. 5116, 140 Cong.Rec. H10,768 (daily ed. October 4, 1994).

relative position of the secured party and the overall rehabilitative theme of bankruptcy law." In re Vanas, 50 B.R. at 997. More recently, the court in In re Mullen, 172 B.R. 473 (Bankr. D. Mass. 1994) clearly stated that Congress "did not wish to limit the exception" and that the statutory language "gives the court the broadest possible charter" in its balancing of the rights and benefits of the parties involved. In re Mullen, 172 B.R. at 478-79.

In the present case, there exists a considerable basis on which the Bankruptcy Court could grant relief to L&E under section 552(b). When 1441 regained possession of the Property, Gold Coast had already purchased the CalFed note at a steep discount, paying only 62% of the face value. It refused to negotiate with 1441, but instead moved immediately to seize the Property, a goal which it eventually accomplished through the credit bid purchase of the Property at its own foreclosure sale. Further, Gold Coast defeated the confirmation of 1441's chapter 11 plan of reorganization by using the bifurcation of its claim as a sword, as Gold Coast was thus able to vote two separate creditor claims (and thus control the voting of two separate classes of claims against 1441's plan) on account of its single pre-bankruptcy undersecured claim. By virtue of the

claim bifurcation, Gold Coast also was able to invoke the rights of an unsecured creditor under the "absolute priority rule" of 11 U.S.C. § 1129(b).[6] Finally, during the case, Gold Coast received over $430,000 in cash payments, exclusive of tenant deposits, as well as the Property itself through the foreclosure sale, a total in value far more than it had paid for the CalFed note.

In its amended decision of September 10, 1998, the Ninth Circuit finally acknowledged that L&E had raised the "equities of the case" argument to the Bankruptcy Court, but held that L&E had presented "insufficient facts" and that "the bankruptcy court made no finding that would support the application." In re 1441 Veteran Street Co., 154 F.3d 1103 (9th Cir. 1998). But the reason that the Bankruptcy Court had "made no finding" was that it had already ruled in favor of L&E on other grounds, and therefore did not reach that issue. Indeed, once the Bankruptcy Court had concluded that Gold Coast's lien did not extend to the funds to be used to

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[6]Therefore, if the Ninth Circuit's decision is allowed to stand, Gold Coast will have been allowed to have its cake (the denial of confirmation due to the bifurcation of the claim) and eat it too (keeping its claim united so that its lien attaches to all accrued rents).

pay L&E's approved compensation, there was no need for the Bankruptcy Court to consider whether the "equities of the case" provision of section 552(b) applied to except the L&E fee award from such a lien. Thus, the Ninth Circuit erred when it failed specifically to remand this matter to the Bankruptcy Court for consideration of whether L&E would otherwise have been entitled to the relief it sought under the "equities of the case" provision of section 552(b).

When this Court has dealt with situations where an argument has never been fully developed in the courts below, this Court has remanded the case for further proceedings on that undeveloped argument. *See* Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464, 468, 67 S.Ct. 798, 800, 91 L.Ed. 1024 (1947); United States v. Ballard, 322 U.S. 78, 88, 64 S.Ct. 882, 887, 88 L.Ed. 1148 (1944). Further, in precisely this situation, the application of section 552(b), the Court of Appeals for the Fourth Circuit specifically remanded a case to the trial court so that a proper record could be developed before the matter would be further considered by an appellate court.

In the case of United Virginia Bank v. Slab Fork Coal Company, 784 F.2d 1188 (4th Cir.), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3275, 91 L.Ed.2d 565

(1986) ("Slab Fork"), the Fourth Circuit heard a matter involving whether certain po petition cash proceeds were subject to a creditor's pre-petition security interest. Reversing the district court, the Fourth Circuit ruled in favor of the creditor and held that the cash was encumbered, just as the Ninth Circuit did in the case at bar. But the Fourth Circuit also noted that section 552(b) "gives the bankruptcy court considerable latitude in applying pre-petition security interests to post-petition proceeds." Slab Fork, 784 F.2d at 1191. The record in that case did not reflect that a balancing of interests, as is required by section 552(b), had been made on the record, "and in any event such a determination should be properly be made in the first instance by the Bankruptcy Court." Id. For those reasons, the Fourth Circuit remanded the matter for further proceedings in accord with section 552(b). Id.

In the present case, the Bankruptcy Court made no finding on the "equities of the case" (and indeed had no reason to make such a finding) because it ruled in favor of L&E by holding that the $100,000 in collected rents was not subject to Gold Coast's lien in the first place. Thus, the Ninth Circuit erred, in conflict with the holding of the Fourth Circuit in Slab Fork, by not specifically

remanding this matter to the Bankruptcy Court for further proceedings under section 552(b).

## IV. CONCLUSION

The Ninth Circuit has committed clear error on several grounds. It has extended this Court's holding in Dewsnup, a chapter 7 case where the holding was limited by this Court to its facts, into the chapter 11 context, where the Tenth Circuit and other courts have clearly held that Dewsnup does not apply. In addition, it has ignored the plain language of the Bankruptcy Code as to the bifurcation of undersecured claims upon the commencement of chapter 11 cases and the reconstitution of such bifurcated claims only upon dismissal, instead creating out of whole cloth a "failed case" exception to the clear requirements of the statute. Further, it has failed specifically to remand to the Bankruptcy Court the question of whether the relief obtained by L&E would otherwise have been obtained by application of the "equities of the case" provision of 11 U.S.C. § 552(b).

For all of these reasons, the Court should issue a writ of certiorari to the Ninth Circuit.

Respectfully submitted,

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**EXHIBIT "A"**

**In re 1441 VETERAN STREET CO., Debtor.**
**GOLD COAST ASSET ACQUISITION, L.P., Appellant,**

**v.**

**1441 VETERAN STREET CO.,**

**and**

**Levene & Eisenberg, Appellee.**

**No. 96-56445.**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 5, 1997.

Decided July 15, 1998.

Emily Brower Miller, Pircher, Nichols & Meeks, Los Angeles, California; Brad Godshall, Pachulski, Stang, Ziehl & Young, Los Angeles, California, for the appellant.

Bennett L. Spiegel, Stuart J. Wald, Wynne Spiegel Itkin, Los Angeles, California, for the appellee.

Appeal from the United States District Court for the Central District of California; Kim McLane Wardlaw, District Judge, Presiding. D.C. No. CV 95-08785 KMW.

Before: SCHROEDER and KOZINSKI, Circuit Judges, and WHYTE,* District Judge.

WHYTE, Judge:

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* The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

Gold Coast Asset Acquisition, L.P. ("Gold Coast") appeals the order, entered by the bankruptcy court on March 8, 1995 and affirmed by the district court on August 13, 1996, awarding Levene & Eisenberg ("L & E"), the debtor's counsel, $100,000 in attorneys' fees out of rents generated by an apartment complex, the debtor's single asset and in which Gold Coast held a secured interest. For the reasons set forth below, we reverse the district court's decision and vacate the order entered by the bankruptcy court.

## I. BACKGROUND

On January 28, 1994, 1441 Veteran Street, Co. ("Veteran") filed for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.* At the time of filing, Veteran's only asset was a luxury apartment building (the "Property") in Los Angeles, California. The Property was encumbered by a promissory note for $12 million ("the Note") and a deed of trust and assignment of rents, which were assigned to Gold Coast. Veteran owed approximately $13.4 million on the Note when it filed for bankruptcy. During the pendency of the bankruptcy proceeding, Veteran paid Gold Coast approximately $265,000 in net rents generated by the Property.

Veteran filed a plan of reorganization which proposed to reduce Gold Coast's secured claim to $8.4 million and to repay this reduced amount over a period of years. On September 7, 1994, Veteran moved under section 506(a) of the Bankruptcy Code, 11 U.S.C. § 506(a), to value the Property at $8.4 million. At the hearing on the valuation motion, the bankruptcy court held that the value of the

Property was $10.1 million. This valuation determined the amount of Gold Coast's secured claim for purposes of confirming the plan of reorganization. At the subsequent confirmation hearing on September 13, 1994, however, the bankruptcy court rejected Veteran's plan and granted Gold Coast relief from the automatic stay. This relief allowed Gold Coast to exercise its remedies under state law.

On November 23, 1994, Gold Coast obtained appointment of a state court receiver for the Property ("Veteran Receiver"). The Veteran Receiver immediately began collecting rents generated by the Property. On December 20, 1994, Gold Coast conducted a nonjudicial foreclosure sale of the Property. Gold Coast purchased the Property with a credit bid of $10 million. By the time of foreclosure, the Veteran Receiver held $251,344.34 in rents. Shortly thereafter, a former receiver transferred additional rents of $80,570.58 to the Veteran Receiver making the total rents held by the Veteran Receiver $331,915.32 as of December 31, 1994.

On November 9, 1994, L & E applied for its fees as an administrative expense in the still pending bankruptcy case. *See* 11 U.S.C. § 503(b). Over Gold Coast's objections, the bankruptcy court awarded L & E $100,000 out of the rents held by the Veteran Receiver. The bankruptcy court then dismissed the case. L & E's theory, adopted by the bankruptcy court, was that Gold Coast's secured claim, previously determined to be $10.1 million, was more than fully satisfied by Gold Coast's $10 million dollar credit bid on the Property and the $265,000 in rents which Veteran directly paid to Gold Coast. The bankruptcy court found that, as a result, Gold Coast had only an

unsecured claim to the remaining rents held by the Veteran Receiver. Therefore, the rents held by the Veteran Receiver were an appropriate source for L & E's attorneys' fees. *See* 11 U.S.C. § 507(a)(1).

Gold Coast appealed this decision to the district court. The district court accepted L & E's arguments and affirmed the decision of the bankruptcy court. This appeal followed.

## II. STANDARD OF REVIEW

This court reviews the district court's decision on a bankruptcy appeal *de novo. In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir.1990). Thus, we review the factual findings of the bankruptcy court under a clearly erroneous standard and conclusions of law *de novo. Id.* A bankruptcy court's award of attorneys' fees is subject to reversal if it is based upon an erroneous application of the law. *See in re Occidental Financial Group, Inc.*, 40 F.3d 1059, 1062 (9th Cir.1994); *In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 322 (9th Cir.1991).

## III. DISCUSSION

To disturb a creditor's rights under traditional state foreclosure law, the federal statutory purpose must be "clear and manifest." *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757, 1765, 128 L.Ed.2d 556 (1994) (citing *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990)). This is especially true when the Bankruptcy Code defines creditors' rights by explicit reference to nonbankruptcy law. In this case, section

552(b) of the Code provides that secured creditors shall enjoy the same rights to postpetition rents and proceeds that they would have under state law. 11 U.S.C. § 552(b).[1]

In BFP, the Supreme Court held that the consideration received at a foreclosure sale may not be attacked as a fraudulent transfer under section 548(a)(2) of the Bankruptcy Code, 11 U.S.C. § 548(a)(2), as long as all requirements of state foreclosure law are satisfied. BFP, 114 S.Ct. at 1765. The Court reasoned in part that a valid foreclosure under state law should not be disturbed absent a clear showing of Congressional intent to the contrary. *Id.* at 1764-65.

The Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), further demonstrates that the Bankruptcy Code is to be read against the background of existing state insolvency laws. In *Dewsnup*, the debtor defaulted on a loan secured by a deed of trust on two parcels of land. Before a foreclosure sale, the debtor filed for reorganization under Chapter 11 of the Bankruptcy Code. That bankruptcy petition, as well as a second similar petition, were dismissed. In 1984, the debtor filed another petition seeking liquidation under Chapter 7 of the Code, 11 U.S.C. § 701 *et seq.* Because of the pendency of this bankruptcy proceeding, the creditor was unable to consummate a foreclosure sale.

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[1] The 1994 amendment to section 552(b), applicable to Chapter 11 cases commenced after October 22, 1994, omits reference to "applicable nonbankruptcy law" in new subparagraph (b)(2) dealing with rents. However, the present case was commenced before the effective date of the amendment.

In 1987, the debtor filed an adversary proceeding in bankruptcy court seeking to avoid a portion of the creditor's lien. The debtor argued that the $120,000 debt exceeded the fair market value of the securing land and that, under sections 506(a) and 506(d) of the Bankruptcy Code, the bankruptcy court should reduce the amount of the lien to the market value of the land. *Id.*, 112 S.Ct. at 776. Although the Court recognized that the language of section 506 embraces some ambiguities, it held that section 506(d) does not allow a debtor to "strip down" a creditor's claim which is secured by a lien and allowed under section 502. *Id.* at 778. The Court began its analysis by noting the ambiguities surrounding section 506 and its relationship to other provisions of the Bankruptcy Code. *Id.* at 777. Given the ambiguities in the text of section 506, the Court was unwilling to conclude that Congress "intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected." *Id.* at 778. The Court also observed that the practical effect of accepting the debtor's argument would be "to freeze the creditor's secured interest at the judicially determined valuation," an approach where any increase in the value of the property by the time of foreclosure would result in a windfall to the debtor. *Id.* The Court held that "any increase over the judicially determined valuation during the bankruptcy rightly accrues to the benefit of the [secured] creditor." *Id.*

We decline L & E's invitation to read section 506(a) as cutting off a secured creditor's right to postpetition rents under section 552(b) after a plan of reorganization has failed. Section 506(a) provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a). Section 506(a) operates to bifurcate a secured creditor's allowed claim into secured and unsecured interests based upon the bankruptcy court's valuation of the secured property. *See Dewsnup*, 112 S.Ct. at 777. A valuation under section 506(a), however, appears to be linked to its identified purpose-e.g., a plan of reorganization. Section 506(a) instructs the bankruptcy court to value the property "in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a); *see In re Madera Farms Partnership*, 66 B.R. 100, 104 (9th Cir. BAP 1986) ("[T]he need to look at the purpose of the valuation appears to have achieved virtually universal acceptance."). It follows that when the purpose behind a particular valuation no longer exists, that valuation becomes irrelevant.

Persuasive authority also indicates that even stipulated values of property become irrelevant when the bankruptcy case fails. *See Madera*, 66 B.R. at 103-104. In *Madera*,

the secured creditor which held a deed of trust with an assignment of rents stipulated that the value of the property exceeded the debt and allowed the debtor to sell the property. However, the debtor did not sell the property within the stipulated time. After the bankruptcy case was dismissed, the creditor foreclosed on the property and bought it with a credit bid in an amount less than the debt. The creditor sought to apply rents to the remainder of its claim. The BAP held that the creditor was not bound by the earlier stipulation. It noted that the rents constituted additional collateral. *Madera,* 66 B.R. at 103. It reasoned that a valuation under section 506(a) is tied to its purpose and is subject to change depending on both temporal and functional considerations. *Id.* at 103-104. The BAP went on to hold that, absent an "irregular or collusive" foreclosure sale, it is entirely proper for a creditor to bid less than the full amount of the debt. *Id.* at 104 (citing *Cornelison v. Kornbluth,* 15 Cal.3d 590, 607, 125 Cal.Rptr. 557, 542 P.2d 981 (1975) (holding that "the mortgagee is not required to open the bidding with a full credit bid, but may bid whatever amount he thinks the property worth.")).

In the present case, the bankruptcy court valued the Property in light of Veteran's proposed plan of reorganization. Since the bankruptcy court rejected the plan, the valuation of the Property served no purpose under the Bankruptcy Code. Therefore, the valuation should not affect Gold Coast's rights to postpetition rents under section 552. The rents generated by the Property constituted Gold Coast's collateral and, thus, were an improper source for L & E's award of attorneys' fees. *See In re Cascade Hydraulics and Utility Service, Inc.,* 815 F.2d 546,

548 (9th Cir.1987) ("Administrative expenses or the general costs of reorganization may not generally be charged against secured collateral.").

L & E points to no other provision of the Bankruptcy Code which reflects an intention to allow a "strip down" of a creditor's lien based upon a section 506(a) valuation when the bankruptcy court denies confirmation of a plan of reorganization and allows a creditor to exercise its state law rights.

L & E contends, nevertheless, that the bankruptcy court's award of attorneys' fees was proper since the attorneys' fees were awarded during the pendency of the bankruptcy case. L & E argues that under section 349 of the Bankruptcy Code, 11 U.S.C. § 349, a creditor's lien is restored only when a bankruptcy case is dismissed.[2] L &

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[2] 11 U.S.C. § 349 provides:

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title –

(1) reinstates –

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under

E's argument appears to assume that Gold Coast's lien had no effect during the pendency of the bankruptcy proceedings and, therefore, attorneys' fees were properly awarded out of rents generated by the Property. Since, according to L & E, the fees were transferred from the bankrupt's estate and thus no longer part of it, they could not become subject to a creditor's lien upon dismissal of the bankruptcy case. This contention, however, overlooks the fact that the rents generated by the Property were an inappropriate source of funds at the time of the fee award. Moreover, L & E offers no authority that section 506(a) was meant to "strip down" creditor's liens solely in order to pay attorneys' fees after a plan of reorganization has been rejected.

L & E argues that *Dewsnup* is limited to Chapter 7 cases. *See Wade v. Bradford*, 39 F.3d 1126, 1128-29 (10th Cir.1994); *In re Bowen*, 174 B.R. 840, 852-55 (Bankr.S.D.Ga.1994); *In re Dever*, 164 B.R. 132 (Bankr.C.D.Cal.1994). However, a review of these cases reveals that *Dewsnup* is inapplicable only when a plan of reorganization has been confirmed under Chapter 11. Nothing suggests that the *Dewsnup* rationale should not apply in a case where a plan of

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section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

reorganization has been rejected. Furthermore, the *Dewsnup* court's requirement that Congress' intent be "clear and manifest" in order to displace traditional state law remains applicable regardless of whether the case is a Chapter 7 or Chapter 11 proceeding.

Lastly, L & E argues that the decision below should be affirmed under the "equities of the case" exception of section 552 of the Bankruptcy Code, 11 U.S.C. § 552. However, it appears that L & E raises this argument for the first time on appeal. Therefore, L & E is precluded from raising this argument. *See United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir.1991) ("Issues not presented to the trial court cannot generally be raised for the first time on appeal.").

In light of the foregoing, we vacate the bankruptcy court's order awarding attorneys' fees to L & E and reverse the decision of the district court affirming the bankruptcy court's order. The matter is remanded to the bankruptcy court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

**EXHIBIT "B"**

**In re 1441 VETERAN STREET CO., Debtor.**
**GOLD COAST ASSET ACQUISITION, L.P.,**

**Appellant,**

**v.**

**1441 VETERAN STREET CO.,**

**and**

**Levene & Eisenberg, Appellee.**

**No. 96-56445.**

United States Court of Appeals,
Ninth Circuit.

Sept. 10, 1998.

Appeal from the United States District Court for the Central District of California; Kim McKane Wardlaw, District Judge, Presiding. D.C. No. CV 95-08785-KMW.

Before: SCHROEDER and KOZINSKI, Circuit Judges, and WHYTE,* District Judge.

Prior report: 144 F.3d 1288

ORDER

The opinion is hereby amended (1) to delete the following sentences appearing in the second-to-last paragraph of the opinion: "However, it appears that L & E raises this argument for the first time on appeal. Therefore, L & E is precluded from raising this argument. See United States v. Flores-Payon, 942 F.2d 556, 558 (9th Cir.1991) ('Issues

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* The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

not presented to trial court cannot generally be raised for the first time on appeal.')" and (2) to substitute therefor: "However, L & E points to insufficient facts to justify application of the exception and the bankruptcy court made no finding that would support the application."

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

**EXHIBIT "C"**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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|---|---|
| In Re<br>1441 VETERAN STREET CO., a California limited partnership,<br>Debtor. | CASE NO. CV-95-8785 KMW<br>MEMORANDUM OF DECISION<br>(Entered August 13, 1996) |
| GOLD COAST ASSET ACQUISITION, L.P.,<br>Appellant,<br>v.<br>1441 VETERAN STREET CO.,<br>Appellee. | |

Gold Coast Asset Acquisition, L.P. ("Gold Coast") appeals the bankruptcy court's decision to pay the attorneys representing the debtor in possession in a Chapter 11 proceeding. It asserts that the bankruptcy court used collateral securing its claim to make the payment. This Court disagrees and **AFFIRMS** the bankruptcy court. It holds that the bankruptcy court correctly found that Gold Coast had received full payment for its secured claim and that this claim had been extinguished. Thus, the bankruptcy court did not use Gold Coast's collateral to pay the attorney's fees.

## I. BACKGROUND

### A. Facts

#### 1. Description of the Debtor and Its Business

Debtor 1441 Veteran Street Co., a limited partnership, constructed Westwood Plaza Apartments ("the Property"). It sold the Property to Bradfarr Corporation. To secure future payments from Bradfarr, it took a second-priority deed of trust against the Property for $2.5 million. California Federal Bank held a first priority deed of trust against the Property for approximately $12 million.

Bradfarr defaulted on its obligations to both 1441 Veteran Street and California Federal Bank. After the default, it filed a Chapter 11 bankruptcy petition. The bankruptcy court granted 1441 Veteran Street relief from the automatic stay and allowed it to foreclose on the Property and to regain possession of it.

#### 2. Debtor Files a Chapter 11 Petition

After 1441 Veteran Street took possession of the property, Appellant Gold Coast purchased the California Federal Bank note for $7.5 million. Gold Coast and 1441 Veteran Street entered negotiations to resolve Gold Coast's claim against the Property. They could not reach a resolution.

Gold Coast filed a motion to appoint a receiver and noticed a trustee's sale of the Property. In response, 1441 Veteran Street filed a Chapter 11 bankruptcy petition to prevent Gold Coast from seizing the Property.

Shortly after the bankruptcy case commenced, the bankruptcy court approved Appellee Levene & Eisenberg's employment as counsel to 1441 Veteran Street as the debtor in possession.

Gold Coast filed a claim for approximately $11 million. To determine the extent that this claim was secured, the bankruptcy court held a hearing to value the Property. It found that the value of the Property was $10,100,000 at the time that 1441 Veteran Street filed its bankruptcy petition. When making this valuation, it considered the present value of the future projected cash flow of the Property – the rents. Appellant's Excerpts of Record at 993. It held that Gold Coast had a secured claim worth $10,100,000. It also held that the remaining portion of its claim was unsecured.

Gold Coast received some of the rental payments that the Property's tenants made during the pendency of the bankruptcy. The payments it received totaled $265,000.

### 3. Rejection of Reorganization Plan and Lifting of Automatic Stay

The bankruptcy court refused to confirm 1441 Veteran Street's reorganization plan. It granted Gold Coast relief from the automatic stay and gave it leave to foreclose on the Property. Gold Coast held a foreclosure sale, and it purchased the Property with a $10 million credit bid.

After the bankruptcy court lifted the automatic stay and released the Property from the bankruptcy estate, its

sole asset was cash that represented rent payments and rental deposits.

#### 4. Division of the Remainder of the Bankruptcy Estate

The bankruptcy court awarded Levene and Eisenberg $100,000 in attorney's fees. It allowed them to take these fees from the rent payments remaining in the bankruptcy estate. Gold Coast received the $100,000 remaining in the estate as payment for its unsecured claim.

### B. The Appeal

Gold Coast appeals the fee award. It asserts that (1) when the bankruptcy court refused to confirm the reorganization plan, it had the right under state law to foreclose on both the apartment building and the rental payments and (2) the bankruptcy court erred by estimating both the value of the Property and the present value of the rent payments as of the date of the bankruptcy filing to value its secured claim. It argues that if the bankruptcy estate had conducted a proper valuation, it would have found that the cash it used to pay Levene and Eisenberg secured Gold Coast's claim and would not have made the payment. Levene and Eisenberg argue that case law supports the bankruptcy court's valuation.

## II. JURISDICTION

This matter is an appeal from a final judgment of the United States Bankruptcy Court for the Central District of California. Thus, this Court has jurisdiction

under section 158(a) of Title 28. *See* 28 U.S.C. § 158(a) ("The district courts of the United States shall have jurisdiction to hear appeals from final judgments [and] orders . . . of bankruptcy judges. . . . "). It sits as an appellate court.

## III. STANDARD OF REVIEW

This Court reviews a bankruptcy court's conclusions of law *de novo. Manufacturers Hanover v. Dewalt (In re Dewalt),* 961 F.2d 848, 850 (9th Cir. 1992). It reviews findings of fact under the clearly erroneous standard. *Id.* The parties agree on all relevant facts. Thus, the *de novo* standard applies because this appeal presents only questions of law.

## IV. RIGHT TO FORECLOSE UPON RENTAL PAYMENTS

At oral argument, Gold Coast asserted that when the bankruptcy court refused to confirm the reorganization plan and lifted the automatic stay on the Property, state law, not federal bankruptcy law, governed its actions. Certainly, it is correct that after the bankruptcy court lifted the stay, state law gave it the right to foreclose on the Property. However, the bankruptcy court did not lift the stay on the rental payments. Thus, it never gave Gold Coast the state law right to foreclose on them. Bankruptcy law continued to govern their disposition.

## V. PRIORITY

The Bankruptcy Code ("the Code") prioritizes types of claims to determine which creditors get paid first. Under this scheme, creditors with secured claims are paid first. *See* 11 U.S.C. § 725. Next, creditors holding claims for administrative expenses are paid. *Id.* § 507(a)(1). Then, unsecured creditors are paid. *Id.* § 507; *id.* § 726.

A claim is secured only to the extent of the value of the collateral that secures it. *Id.* § 506(a). Thus, a claim is totally secured if the collateral meets or exceeds the value of the claim. However, if the value of the collateral is less than the value of the claim, the Code bifurcates the claim into (1) a secured claim equal to the value of the collateral and (2) an unsecured claim for the claim amount that exceeds the value of the collateral. *Id.* If a bankruptcy court bifurcates a claim, the secured claim is paid first, and the unsecured claim is paid after all the secured claims and administrative expense claims are paid. If the cash that the bankruptcy court used to pay Levene and Eisenberg's fees did not secure Gold Coast's claim, then it did not err in making this payment. But if the cash secured Gold Coast's claim, the bankruptcy court erred when by [sic] using it to pay Levene and Eisenberg's fees. Thus, the issue becomes whether the cash secured Gold Coast's claim.

## V. THE VALUE OF GOLD COAST'S SECURED CLAIM

### A. Law Governing Status of Rental Payments As Collateral

The Code provides that rental payments can be collateral distinct from the underlying real estate:

> [I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552(b)(1).

"[P]ost-petition payments to a secured creditor who possesses a security interest in rents are payments on account of a separate and distinct item of collateral, apart from the underlying real estate which also secures the creditor's claims and which generates such rents." *In re Vermont Investment Ltd. Partnership*, 142 B.R. 571, 574 (Bankr. D.D.C. 1992); *see also Mutual Life Ins. Co. v. Paradise Springs Assocs. (In re Paradise Springs Assocs.)*, 165 B.R. 913, 926 (Bankr. D. Ariz. 1993) (same); *In re Birdneck Apartment Assocs.*, 156 B.R. 499, 505 (Bankr. E.D. Va. 1993)

(same); *In re Flagler-at-First Assocs., Ltd.*, 114 B.R. 297, 301 (Bankr. S.D. Fla. 1990) (same).

### B. Valuing the Allowed Secured Claim

Courts are split about how to value a creditor's claim when it has a security interest in both real estate and the rents arising from it.

#### 1. The Continuous Valuation Method

Gold Coast advocates that the Court adopt the continuous valuation method to value its secured claim. This method allows an undersecured creditor to use rents to augment its collateral position.

##### a. Description of the Continuous Valuation Method

Under the continuous valuation method, the bankruptcy court values the underlying real estate without considering the present value of the rental payments. As rental payments are made, the bankruptcy court adds them to the value of the underlying real estate.

The rent payments, thus, increase the value of the creditor's secured claim. As the creditor receives these payments, they decrease the secured claim. *In re Vermont Investment Ltd.* Partnership, 142 B.R. at 571; *In re Landing Assocs., Ltd.*, 122 B.R. 288, 297 (Bankr. W.D. Tex. 1990). "The result is essentially a 'wash' in that the additional collateral value represented by the . . . rents is to be set-off by the fact that [the creditor] has . . . received them

during the course of the Chapter 11." *In re Flagler-at-First Assocs., Ltd.*, 114 B.R. at 302.

Generally, this "wash" causes the value of the creditor's secured claim to be the value of the underlying real property. *In re Paradise Springs Assocs.*, 165 B.R. at 926. However, where a secured creditor has not received the rental payments during the course of the bankruptcy a "wash" does not occur, and the bankruptcy courts add the value of the post-petition rents to the value of the underlying real estate to determine the total value of the creditor's secured claim. *See id.* at 924, 926; *In re Landing Assocs.*, 122 B.R. at 291.

Proponents of the continuous valuation method argue that *dicta* in two Supreme Court cases supports the method. First, in *United Savings Association v. Timbers of Inwood Forest Associates*, the Supreme Court distinguished lost opportunity costs from secured post-petition rents and held that an undersecured creditor could not augment his collateral position by demanding use value payments:

> Section 552(b) . . . makes possession of a perfected security interest in postpetition rents or profits from collateral a condition of having them applied to satisfying the claim of the secured creditor ahead of the claims of unsecured creditors. Under petitioner's interpretation, however, the undersecured creditor who lacks such a perfected security interest in effect achieves the same result by demanding the "use value" of his collateral.

*United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 374 (1988). It reasoned that allowing an

undersecured creditor to demand the "use value" of its collateral was inconsistent with section 552(b). Courts have interpreted this *dictum* to mean that creditors who had secured post-petition rents could use them to augment their collateral positions.

Second, in *Dewsnup v. Timm*, the Supreme Court stated that "[a]ny increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors . . . who had nothing to do with the mortgagor-mortgagee bargain." *Dewsnup v. Timm*, 502 U.S. 210, 417 (1992). Proponents of the continuous valuation method contend that the rent payments are increases over the judicially determined valuation of the property and that the *Dewsnup* holding gives creditors the right to these increases.

**b. Application of the Continuous Valuation Method**

In this case, Gold Coast had received some, but not all, of the rent payments during the Chapter 11 case. To the extent that it did not receive the rents, it argues that the bankruptcy court should have added them to the value of the Property to determine the value of its secured claim. Under the continuous valuation method, the rental payments that the bankruptcy court used to pay Levene and Eisenberg were collateral that secured Gold Coast's claim. Thus, under the Code's priority scheme they had to be used to pay Gold Coast, not Levene and Eisenberg.

### 2. The Single Valuation Method

Under the single valuation method, the bankruptcy court values the underlying property and the present value of the future rents as of the day that the debtor files its bankruptcy petition in order to determine the value of the creditor's secured claim. *In re Addison Properties Ltd. Partnership,* 185 B.R. 766, 771-72 (Bankr. N.D. Ill. 1995). As the creditor receives rental payments, they decrease the secured claim unless the value of the underlying real estate decreases during the pendency of the bankruptcy case. *Id.* at 773; *In re 354 East 66th Street Realty Corp.,* 177 B.R. 776, 781 (Bankr. E.D.N.Y. 1995); *In re Reddington/ Sunarrow Ltd. Partnership,* 119 B.R. 809, 813 (Bankr. D.N.M. 1990).

The courts following the single valuation method argue that Supreme Court *dicta* does not indicate that it would object to this method. They note that the *Dewsnup* Court carefully restricted its statement that increases in valuation accrue to creditors to the facts before it. *In re Addison Properties Ltd. Partnership,* 185 B.R. at 774. The *Timbers* Court "simply states that Section 552(b) results in . . . rents being made available to satisfy . . . a claim" but does not comment on how the rents should be valued. *Id.* The single valuation method is not inconsistent with the Supreme Court's observation. "It fixes the value of the secured claim as of the beginning of the case, and then protects that value. In a situation where the underlying collateral was declining in value, the single valuation approach would require that proceeds constituting cash collateral under Section 552(b) be applied to the secured

claim before being used for any other purpose." *Id.* at 775.

### 3. The Dual Valuation Method

Under the dual valuation method, the bankruptcy court values the underlying property twice. *See id.* at 784. It values the property as of the date of the bankruptcy filing for purposes of adequate protection. Rental payments made during bankruptcy increase the collateral securing the claim but do not increase the claim for purposes of adequate protection. Thus, the debtor in possession may use the rental payments to fuel its reorganization if the underlying collateral is not declining in value.

The second valuation occurs at confirmation. The bankruptcy court reduces the secured claim by the amount of any payments that the debtor made to the creditor during the pendency of the bankruptcy case. Any rents that the debtor has not spent increases the secured claim. Furthermore, any appreciation in the value of the underlying collateral increases the claim.

### 4. Analysis

Several policies underlying the Code support adopting the single valuation method that the bankruptcy court used.

First, "absent bankruptcy, if a creditor. . . . enforced its assignment of rents and took possession of the rents without foreclosing, it would still need to apply those

rents to the debt as it existed at the time the rents were received." *In re 354 East 66th Street Realty Corp.*, 177 B.R. at 782. The creditor could collect the rents and not apply them to the debt only if it foreclosed on the property and then bought it at the foreclosure sale. *Id.* When the debtor files a bankruptcy petition, the automatic stay precludes the creditor from foreclosing on the property. If the Court interprets the Code to allow the creditor to "keep the rents [during the bankruptcy proceeding] and not apply them to the debt, then one of the purposes of the automatic stay is defeated." *Id.*

Second, the single valuation method comports with the fresh start policy underlying the Code. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (holding that a policy underlying the Code is giving an honest but unfortunate debtor a fresh start by giving it a chance to reorganize). The single valuation method "balance[s] the bankruptcy process in favor of the debtor in any case where the major creditor is secured by both the debtor's assets and by the income that those assets produce." *In re Addison Properties Ltd. Partnership*, 185 B.R. at 773; *cf id.* at 778 (stating that the continuous valuation method favors the creditor); *id.* at 784 (stating that the dual valuation method does not favor the debtor). "[T]he longer a debtor remains in bankruptcy, accumulating income, the better will be its chances of confirming a plan, since the accumulated cash may be used to reduce the creditor's secured claim, which does not increase during the pendency of the case." *Id.*

Third, the single valuation method maximizes the resources of the bankruptcy estate. The dual valuation

method requires two valuation hearings. Valuation hearings are expensive duels of expert witnesses and attorneys. Forcing the bankruptcy estate to finance two valuation hearings unnecessarily taxes its limited resources and limits the debtor's access to cash that it needs to fuel its reorganization.

Fourth, contrary to Gold Coast's protestations, the single valuation method does not void section 552. It gives persons with security interests in after-acquired collateral "greater rights than those of secured creditors without the additional lien." *In re 354 East 66th Street Realty Corp.*, 177 B.R. at 781. Rents that constitute cash collateral under section 552(b) must be applied to the secured claim if the underlying collateral declines in value. *In re Addison Properties Ltd. Partnership*, 185 B.R. at 775. Creditors without a security interest in after-acquired collateral do not have a source of funds that *must* be used to make up this decline in value.

### 5. Application of Single Valuation Method

The $10 million that Gold Coast received when it sold the Property plus the $265,000 it received in rent payments totals $10,265,000. Gold Coast recouped the full $10.1 million value of its secured claim. Lewis and Eisenberg's fee request, an administrative expense, had priority over Gold Coast's remaining unsecured claim. Thus, the bankruptcy court did not err in using cash from the bankruptcy estate to pay Lewis and Eisenberg before it paid Gold Coasts' unsecured claim.

Applying the single valuation method does not strip Gold Coast of its liens. Gold Coast argues that the bankruptcy court undervalued its secured claim and that adopting this valuation of its secured claim strips it of its lien on the rental payments. Presumably, its evidence of undervaluation is that the sum of the winning bid in the foreclosure sale and the rental payments exceed $10.1 million. However, the bankruptcy court included the present value of the rents in its valuation of the Property. Gold Coast does not adduce any evidence that the price it paid for the Property in the foreclosure sale did not include a payment for future rents.

## VII. CONCLUSION

For the foregoing reasons, the Court **AFFIRMS** the bankruptcy court's order granting Levene and Eisenberg's fee request.

**IT IS SO ORDERED.**

DATED: August 8, 1996

/s/ Kim M. Wardlaw
- KIM McLANE WARDLAW
United States
District Judge

**EXHIBIT "D"**

SCOTT C. DEW (SBN 117515) and
CHRISTOPHER W. COMBS (SBN 148389),
Members of LEVENE & EISENBERG,
a Professional Corporation
1901 Avenue of the Stars
Suite 1600
Los Angeles, California 90067
(310) 551-1010

Attorneys for Debtor and
Debtor in Possession

**UNITED STATES BANKRUPTCY COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| In re | CASE NO. LA 94-13693-SB |
| 1441 VETERAN STREET CO., a California limited partnership, | CHAPTER 11 |
| Debtor. | ORDER RE "FINAL APPLICATION OF LEVENE & EISENBERG, A PROFESSIONAL CORPORATION, FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES" |
| | DATE: January 31, 1995<br>TIME: 11:00 a.m.<br>PLACE: Courtroom "1575" 255 E. Temple Street Los Angeles, CA 90012 |
| | (Filed Mar. 6, 1995) |

At 11:00 a.m. on January 31, 1995, there was a hearing before the Honorable Samuel L. Bufford, United States Bankruptcy Judge, to consider the "Final Application of Levene & Eisenberg, a Professional Corporation, for Allowance of Compensation and Reimbursement of Expenses" (the "Fee Application"). Scott C. Dew, a Member of Levene & Eisenberg, a Professional Corporation ("L&E"), appeared on behalf of L&E, and Jeffrey P. Meyer, of counsel to Pircher, Nichols & Meeks, appeared on behalf of Gold Coast Asset Acquisition, L.P. ("Gold Coast").

The Court, having considered the Fee Application, the other pleadings and matters filed by the Debtor and Gold Coast, and the arguments of counsel, and based on the "Stipulation between Levene & Eisenberg and Gold Coast Concerning Distribution of Funds Held by Receiver" (the "Stipulation", a copy of which is attached as Exhibit "A"), pursuant to which L&E waived any right to make any claim with respect to funds held by either or both of the receivers appointed by the Los Angeles County Superior Court to manage the improved real property of the Debtor's estate and consented to the receivers' distributing any funds held in receivership to Gold Coast, and pursuant to which Gold Coast agreed to transfer or cause to be transferred $100,000.00 to L&E in payment of L&E's administrative claim as described below, it is:

ORDERED that the Fee Application is granted to the extent provided in this Order; and it is further

ORDERED that a claim entitled to administrative expense priority be allowed in favor L&E in the amount

of $100,000.00, exclusive of any pre-petition retainer, pursuant to sections 330(a), 503(b)(2) and 507(a)(1) of the Bankruptcy Code; and it is further

ORDERED that, by entering into the Stipulation or not objecting to the form and content of this Order, Gold Coast shall not have or be deemed to have waived any right to object to any findings of fact or conclusions of law made by the Court in connection with this Order or any right to appeal the Order; and it is further

ORDERED that the Stipulation is approved, and L&E's administrative claim shall be satisfied as provided in the Stipulation.

DATED: February ___, 1995

SAMUEL L. BUFFORD
THE HONORABLE
SAMUEL L. BUFFORD
UNITED STATES
BANKRUPTCY JUDGE

MAR - 6, 1995

Approved as to form ~~and content~~. [/s/ JM]
GOLD COAST ASSET ACQUISITION, L.P.

By: /s/ Jeffrey P. Meyer
JEFFREY P. MEYER
PIRCHER, NICHOLS & MEEKS
Attorneys for Gold Coast
Asset Acquisition, L.P.

SCOTT C. DEW (SBN 117515) and
CHRISTOPHER W. COMBS (SBN 148389),
Members of LEVENE & EISENBERG,
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1901 Avenue of the Stars
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Los Angeles, California 90067
(310) 551-1010

Attorneys for Debtor

**UNITED STATES BANKRUPTCY COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| In re | CASE NO. LA 94-13693-SB |
| 1441 VETERAN STREET CO., a California limited partnership, | CHAPTER 11 |
| Debtor. | STIPULATION BETWEEN LEVENE & EISENBERG AND GOLD COAST CONCERNING DISTRIBUTION OF FUNDS HELD BY RECEIVER |
| | [NO HEARING REQUIRED] |

This "Stipulation Between Levene & Eisenberg and Gold Coast Concerning Distribution of Funds Held by Receiver" (the "Stipulation") is being entered into by and between Levene & Eisenberg, a Professional Corporation ("L&E"), and Gold Coast Asset Acquisition, L.P. ("Gold Coast") with reference to the following recitals:

A. As of December 20, 1994, Sonny H. Astani, the receiver appointed by the Superior Court of the State of

California, County of Los Angeles ("Astani") to manage the improved real property (the "Property") of the estate of 1441 Veteran Street Co., a California limited partnership (the "Debtor"), held $251,344.34, comprised of $100,519.44 turned over by the Debtor, plus $82,275.40 representing rents collected less expenses paid for the period November 23, 1994 to December 20, 1994, plus $64,200.00 in tenant security and other deposits, plus $6,475.00 in pre-paid rent, and less $1,625.00 for a tenant receivable.

B. In addition, as of December 20, 1994, Gary A. Plotkin, the receiver appointed by the Superior Court of the State of California, County of Los Angeles ("Plotkin") to manage the Property prior to the commencement of the Debtor's case held $80,570.98, which funds were turned over to Astani on or about December 28, 1994.

C. On December 20, 1994, there was a foreclosure sale of the Property at which gold Coast acquired the Property.

D. On January 31, 1995, there was a hearing before the honorable Samuel L. Bufford, United States Bankruptcy Judge, on the "Final Application Of Levene & Eisenberg, A Professional Corporation, For Allowance Of Compensation And Reimbursement Of Expenses" (the "Fee Application"). The Court granted the Fee Application in part and ordered that L&E receive payment of its administrative claim of $100,000 from funds that, as of December 20, 1994, were held by Astani and/or Plotkin.

E. On or about February 8, 1995, there will be a hearing before the Superior Court of the State of California, County of Los Angeles to consider the closure of

Astani's receivership of the Property and the turnover of funds held by Astani to Gold Coast.

F. Gold Coast desires to avoid any delay in the closure of Astani's receivership which could be occasioned by L&E's making a claim as to funds held in receivership. L&E requires assurance that its administrative expense claim, allowed by the Court pursuant to the Fee Application, will promptly be paid. Finally, both parties require that their rights to appeal the order granting the Fee Application are not affected.

WHEREFORE, L&E and Gold Coast, through their respective, authorized representatives, stipulate as follows:

1. Subject to the other provisions of the Stipulation, L&E agrees to refrain from taking any action to intercede with respect to Astani's receivership, waives any right to object to the closure of Astani's receivership, and consents to Gold Coast's receiving all funds held in Astani's receivership.

2. Gold Coast agrees to use reasonable efforts in closing Astani's receivership as soon as practicable. Notwithstanding the provisions of paragraph 1 of the Stipulation, Gold Coast agrees that, if Astani's receivership is not closed on or before March 1, 1995, L&E may intercede and bring whatever action L&E deems appropriate to close Astani's receivership, provided that L&E supports Gold Coast's receipt of all funds held in Astani's receivership.

3. As soon as practicable following the closure of Astani's receivership or Gold Coast's receipt of at least

$100,000 from funds held in Astani's receivership, other than funds representing tenant security or other deposits, Gold Coast agrees to transfer or cause to be transferred to L&E the sum of $100,000 in payment of L&E's administrative expense claim against the Debtor's estate.

4. Nothing in this Stipulation shall affect the right of Gold Coast or L&E to appeal the order granting in part the Fee Application or to seek a stay pending appeal, except to the extent set forth herein.

DATED: February 6, 1995 LEVENE & EISENBERG,
a Professional Corporation
By: /s/ Scott C. Dew
SCOTT C. DEW
A member thereof

DATED: February 8, 1995
GOLD COAST ASSET
ACQUISITION, L.P.

By: /s/ Jeffrey P. Meyer
JEFFREY P. MEYER
PIRCHER, NICHOLS
& MEEKS
ATTORNEYS FOR GOLD
COAST ASSET
ACQUISITION, L.P.

**EXHIBIT "E"**

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| In Re: | ) | Case No. LA94-13693-SB |
| 1441 VETERAN STREET CO., | ) | |
| Debtor. | ) | |

TRANSCRIPT OF PROCEEDINGS
Held in Los Angeles, California
January 10, 1995

BEFORE THE HONORABLE SAMUEL L. BUFFORD

Echo Reporting, Inc.
225 Broadway, Suite 350
San Diego, California 92101
(619) 238-5173

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

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| | | |
|---|---|---|
| In Re: | ) | Case No. LA94-13693-SB |
| 1441 VETERAN STREET CO., | ) | Los Angeles, California |
| Debtor. | ) | Tuesday, January 10, 1995 |
| | ) | 2:00 p.m. |

CONT'D HRG. RE FINAL APPLICATION OF LEVENE & EISENBERG FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SAMUEL L. BUFFORD
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

| | |
|---|---|
| For Gold Coast Acquisition: | JEFFREY P. MEYER, ESQ.<br>Pircher, Nichols & Meeks<br>1999 Avenue of the Stars<br>Los Angeles, California 90067<br>(310) 201-8927 |
| For the Debtor: | SCOTT C. DEW, ESQ.<br>Levene & Eisenberg<br>1901 Avenue of the Stars<br>Suite 1600<br>Los Angeles, California 90067<br>(310) 551-1010 |
| Court Recorder: | Hilda Avila<br>United States Bankruptcy Court<br>Edward R. Roybal Federal Building<br>255 East Temple Street<br>Los Angeles, California 90012<br>(213) 894-5932 |

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

| | |
|---|---|
| Transcriber: | Kathy Lewellin<br>Echo Reporting, Inc.<br>225 Broadway<br>Suite 350<br>San Diego, California 92101<br>(619) 238-5173 |

[p. 1] **LOS ANGELES, CALIFORNIA; TUESDAY, JANUARY 10, 1995 2:00 PM**

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(Call to order of the Court.)

THE COURT: 305, 1441 Veteran Street.

MR. MEYER: Good afternoon, your Honor. Jeffrey Meyer for the secured creditor Gold Coast Asset Acquisition.

MR. DEW: Good afternoon, your Honor. Scott Dew, a member of Levene and Eisenberg, counsel to the debtor and appearing on behalf of Levene and Eisenberg.

Your Honor, it may make sense to review a brief history of this case and its predecessor case before considering the fee application, and I will keep it brief.

Veteran Street owned the property prior to 1992, and sold the property to Bradfarr Corporation. Bradfarr Corporation borrowed funds from Cal Fed to purchase the property and wrote back a secured note to Veteran Street in connection with purchase.

THE COURT: As a second –

MR. DEW: As a second lien.

THE COURT: – lien, uh-huh.

MR. DEW: Both those notes went into default in the year 1992. Cal Fed appointed a receiver who took possession of the property and collected rents – after paying expenses totaling $81,000 as of the fall of 1992, to stave off foreclosure sales by both Cal Fed – and Veteran [p. 2] Street, Bradfarr Corp filed a Chapter 11 case.

THE COURT: Yes, I am aware of that.

MR. DEW: In the context of the case –

THE COURT: And I granted a relief from stay.

MR. DEW: To both Cal Fed and Veteran Street. Veteran Street foreclosed on the property first. Veteran Street then filed this Chapter 11 case.

THE COURT: Right.

MR. DEW: Up until mid December of last year –

THE COURT: So Cal Fed sold the loan then, didn't it?

MR. DEW: Correct.

THE COURT: Yes.

MR. DEW: Cal Fed then sold the loan to Gold Coast.

THE COURT: Yes, and so Mr. Graham is no longer litigating this and it's Mr. Meyer instead?

MR. DEW: That is correct. That's about all that's changed from that prospective, your Honor.

THE COURT: Well, I'm not sure about that.

MR. DEW: Fair enough.

Your Honor, the receiver that was appointed prior to the Bradfarr case was holding $81,000 through the Bradfarr case and through this case up until, I believe, mid December of last year when the receiver turned over those [p. 3] funds to a new receiver that Gold Coast had appointed. That new receiver then received the $81,000

that had formerly been held by the receiver that Cal Fed had appointed back in '92.

We now have a receiver on the property who is holding, we believe, but we haven't seen a report – we believe somewhere in excess of $100,000 – probably less than $130,000. Those funds are being held by the receiver. Meanwhile, on December 20th of last year, Gold Coast foreclosed on the real property. We have brought a motion to dismiss this case which is going to be heard at the end of this month.

The time is appropriate to consider a fee application of Levene and Eisenberg. The issue on the fee application is, I think a two-fold source of funds and is it appropriate to pay Levene and Eisenberg's fees from the source of funds? The only source of funds are the money being held by the receiver. Levene and Eisenberg's total net fees in the case approximately $131,000. We think the receiver is holding about $100,000. We believe that payment of Levene and Eisenberg's fees from funds held by the receiver is appropriate for a variety of reasons. First of all, the one form of action rule. They foreclosed on the property pursuant to the deed of trust in a non-judicial foreclosure. They had their one form of action. CCP cuts [p. 4] off any further rights of this creditor to receive payment. That is the first argument.

The second argument, based on a motion brought by Veteran Street under Bankruptcy Rule 3012, this Court valued the collateral of Gold Coast at $10,290,000. The value of the collateral – the value of the secured claim. During the course of the case, Gold Coast received payments well in excess of $200,000 from the net cash flow of

the property, thereby reducing the secured claim. Thereafter, Gold Coast foreclosed on the property, getting their full value of $10,290,000. The money being held by the receiver is therefore not part of Gold Coast's secured claim. Gold Coast may have an unsecured claim, but that unsecured deficiency claim is subordinate to any priority or administrative claim of L & E.

Your Honor, the third argument is an equitable argument – is that Gold Coast bought this note for a substantial discount in the neighborhood of $8,000,000. They are getting in excess of $10,000,000 in collateral value – to apportion the rents collected to pay administrative claims is only appropriate on an equitable basis.

THE COURT: Has this matter been briefed?

MR. DEW: Yes, your Honor. The arguments I have just made have not been fully briefed.

[p. 5] MR. MEYER: Your Honor, we – the only –

THE COURT: That's what I was asking. I didn't see a brief on it.

MR. DEW: Your Honor, and I have not received a response from Gold Coast because I believe it was sent to the wrong address. I have seen it – we didn't receive it – I received it from Mr. Meyer's associate at a prior hearing on this matter.

MR. MEYER: Which was over a month ago, your Honor. We haven't received a reply. And these issues have not been briefed. The only issue to which we – that we addressed in our opposition was the 506(C) issue, because we do believe that even under this historical scenario the collateral, even the receiver's funds, the

Bradfarr receiver's funds, constitute our cash collateral. We think under the 9th Circuit case law – it's the 506(C) – that collateral can't be charged with their fees.

In addition, it is inconceivable to me that Mr. Dew can brief successfully the issue that a post-foreclosure turnover by a receiver of rents that he is holding is barred by the one-action rule. It may have been barred if we had taken money from the receiver prior to the foreclosure, but that's not California law – that's not how the one-action rule works, and we would be prepared to brief it because these issues have not been briefed, nor has the history been [p. 6] set forth. With respect –

THE COURT: Well, I'm reasonably familiar with the history, but the legal issues, I think, need to be briefed.

MR. MEYER: Okay.

MR. DEW: Your Honor, we can – we can brief these issues and my suggestion would be that there is a hearing pending on dismissal of this case on the 30th of this month – excuse me, the 31st of this month at 11:00 o'clock a.m. Would it be possible to have a continued hearing on this matter at the same time as the dismissal motion?

THE COURT: Very well.

MR. DEW: And –

MR. MEYER: When would – and when would you serve your brief?

MR. DEW: We would serve our brief Friday of this week. We can have these issues briefed. We will serve

it by a messenger on Friday afternoon, which I believe is the 12th.

MR. MEYER: 13th.

THE COURT: 13th.

MR. DEW: 13th. I would request that the opposing reply be filed and served on the – one week later on the 20th.

MR. MEYER: That's agreeable, your Honor.

MR. DEW: And served by messenger.

[p. 7] MR. MEYER: That's agreeable.

THE COURT: Okay.

MR. DEW: Thank you very much, your Honor.

THE COURT: Let me ask one question just to make sure. Mr. Meyer, is your opposition directed only to the source of funds or do you also object to the amount of fees that Mr. Dew's firm is asking.

MR. MEYER: Your Honor, opposition as drafted specifically said that it does not address the amount, because we think that is a matter of law, given the source of funds issue, this Court can't charge a penny. To the extent that we are now going to have a hearing, we are to address all these issues. In the event that the Court rules adversely to our position, we will in the supplemental pleading filed on the 20th, address the issue of the amount.

THE COURT: Okay.

MR. DEW: I would just request the opportunity then to reply to that issue with the pleading to be filed on the following Tuesday, which would be the 23rd.

THE COURT: 21st. No, I looked at the wrong calendar – 24th.

MR. DEW: 24th?

THE COURT: Yes.

MR. DEW: 24th, your Honor.

THE COURT: Very well.

[p. 8] MR. DEW: Serving that by messenger. Thank you.

MR. MEYER: Thank you, your Honor.

(Proceedings recessed.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Lewellin 6/16/95
Transcriber Date

**EXHIBIT "F"**

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| In Re: | ) | Case No. LA94-13693-SB |
| 1441 VETERAN STREET CO., | ) | |
| Debtor. | ) | |

TRANSCRIPT OF PROCEEDINGS
Held in Los Angeles, California
January 31, 1995

BEFORE THE HONORABLE SAMUEL L. BUFFORD

Echo Reporting, Inc.
225 Broadway, Suite 350
San Diego, California 92101
(619) 238-5173

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

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| | | |
|---|---|---|
| In Re: | ) | Case No. LA94-13693-SB |
| 1441 VETERAN STREET CO., | ) | Los Angeles, California |
| Debtor. | ) | Tuesday, January 31, 1995 |
| | ) | 11:00 a.m. |

A. CONT'D HRG. RE FINAL APPLICATION OF LEVENE & EISENBERG FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES

B. HRG. RE MOTION TO DISMISS
CHAPTER 11 CASE

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SAMUEL L. BUFFORD
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

| | |
|---|---|
| For Gold Coast Asset Acquisition: | JEFFREY P. MEYER, ESQ.<br>Pircher, Nichols & Meeks<br>1999 Avenue of the Stars<br>Los Angeles, California 90067<br>(310) 201-8927 |
| For the Debtor: | SCOTT C. DEW, ESQ.<br>Levene & Eisenberg<br>1901 Avenue of the Stars<br>Suite 1600<br>Los Angeles, California 90067<br>(310) 551-1010 |

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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|---|---|
| Court Recorder: | Hilda Avila<br>United States Bankruptcy Court<br>Edward R. Roybal Federal Building<br>255 East Temple Street<br>Los Angeles, California 90012<br>(213) 894-5932 |
| Transcriber: | L. L. Francisco<br>Echo Reporting, Inc.<br>225 Broadway<br>Suite 350<br>San Diego, California 92101<br>(619) 238-5173 |

[p. 1] **LOS ANGELES, CALIFORNIA: TUESDAY, JANUARY 31, 1995**

(Call to order of the Court.)

THE COURT: 200 and 201, 1441 Veteran Street.

MR. MEYER: Good morning, your Honor, Jeffrey Meyer on behalf of Gold Coast Asset Acquisition LP, the secured creditor.

MR. DEW: Good morning, your Honor, Scott Dew a member of Levene and Eisenberg on behalf of Levene and Eisenberg, Applicant and on behalf of Veteran Street.

Your Honor, is 201 the fee application?

THE COURT: 201 is the fee application and the motion to dismiss.

MR. DEW: Let's take the fee application first, your Honor. Your Honor – if that's appropriate?

THE COURT: Go ahead, sir.

MR. DEW: There are two issues with respect to the fee application of Levene and Eisenberg, which seeks allowance and payment at approximately 157,000 in fees. The two issues are source of payment and reasonableness of the fees.

The source of payment is a fund that is being held by a receiver in the amount of approximately $251,000 and is comprised of approximately $90,000 in funds that were turned over from a receiver appointed approximately two and a half [p. 2] years ago, as well as the net rents from

the property for the period December/January – December and January – December of 1995, January of 1995.

Your Honor, payment of Levene and Eisenberg's fees out of this fund is appropriate for several reasons. First of all, the secured creditor, Gold Coast, has foreclosed on the property. The creditor has taken its one form of action. Section 726(a) of the Civil Code precludes any further action by the creditor with respect to the creditor's collateral.

THE COURT: I don't think so, sir.

MR. DEW: Your Honor, the language of 726(a) states that there shall be one form of action –

THE COURT: I'm aware of the language, sir. That's not helpful.

MR. DEW: Your Honor, if you could articulate the objection or concern perhaps I could address it.

THE COURT: The case law – interpreting that statute does not indicate the security is waived by foreclosure on one item of security. And that's what you're arguing for. That does not appear to be, you know, the California law.

MR. DEW: Your Honor, I believe that the California law under the one form of action rule has been somewhat confused. Our review of the law led to the [p. 3] conclusion that there is no clear law with respect to Section 726(a) of the California Civil Code. Courts have held that a receiver's payment to a secured creditor constituted a form of action. That was in the Bayside Development case, which of course has been revoked, but indeed indicated a confusion among the courts as to the

meaning of the form of action under Section 726(a) of the California Civil Code.

There is a second argument in support of Levene and Eisenberg's fees being paid out of the receiver's funds. And that argument is that the Court determined the value of the property to be 10.1 million dollars. In addition to foreclosing on the property valued at 10.1 million dollars, the creditor has received in excess of $250,000 in payments during the course of the case. Thus, the creditor has received a quarter of a million dollars plus in excess of the creditor's secured claim.

THE COURT: I think that's a much better argument.

MR. DEW: Thank you, your Honor.

The creditor's secured claim has been fully satisfied. That being the case, the remaining property of the estate should be divided up among creditors of the estate in the order of the priority under the bankruptcy code. That would include first administrative claimants and secondly unsecured claimants. There would be enough here in [p. 4] this fund to satisfy all priority claims as well as unsecured claims of the estate. Your Honor, that is the argument with regard –

THE COURT: Under that theory, there would be how much available for paying priority and unsecured claims, –

MR. DEW: Your Honor, –

THE COURT: – 150,000 or so?

MR. DEW: – the Court issued a tentative allowance of Levene and Eisenberg's fees and costs in the amount of $100,000, that would leave approximately $150,000 for payment of unsecured claims. Total unsecured claims approximate $30,000 many of which are held by Gold Coast, since Gold Coast purchased many of the unsecured claims.

THE COURT: I don't see how you get that much money, sir. The property was worth 10.1 million?

MR. DEW: That is correct, your Honor.

THE COURT: Gold Coast bid 10 million for it?

MR. DEW: Gold Coast did not bid 10 million for the property, your Honor.

THE COURT: Isn't that what the evidence indicates?

MR. DEW: Your Honor, there is a declaration that was filed which I believe indicates that Gold Coast did less than 10.1 million for the property. If I could direct the question to Mr. Meyer he could answer that.

[p. 5] THE COURT: Isn't there a deed indicating that Gold Coast did 10 million?

MR. DEW: Your Honor, there is a notice of sale indicating that the property will be sold. I do not believe I have a deed indicating the property was sold for 10 million –

THE COURT: I thought I saw a trustee's deed indicating that Gold Coast bid 10 million.

MR. MEYER: You're correct, your Honor, that was Exhibit L to our papers.

MR. DEW: I stand corrected, your Honor. Gold Coast bid 10 million on a 10.1 million dollar claim, thus, there was – Gold Coast underbid by $100,000 and Gold Coast would be entitled to an additional $100,000 to satisfy its secured claim, leaving a residual more than adequate to satisfy the allowed fees and costs of Levene and Eisenberg as well as unsecured claims of the estate.

With that, your Honor, I would ask if the Court has any additional questions and if not I would turn over the podium to Mr. Meyer.

THE COURT: Do you wish to be heard further on the amount of the attorneys' fees?

MR. DEW: Your Honor, we would accept the Court's tentative ruling of $100,000. We believe the fees were reasonable. This was a tough, difficult case with a lot of [p. 6] litigation, a lot of depositions. However, your Honor, we are willing to accept the $100,000 that the Court has tentatively allowed.

THE COURT: Mr. Meyer.

MR. MEYER: Your Honor, unless requested by the Court I won't address the 726 argument. But, I will address the issue of the Court's determination as to value. But before I do that – and the resulting deficiency. Before I do that, I think it would be really constructive, however, to really talk about what the receiver's fund represent [sic]. The receiver's funds represent also $100,000 of post-foreclosure collections in which the Debtor has no interest. We foreclosed on December 20th.

The Debtor, counsel, the estate, has no interest in funds that were required by the receiver post-foreclosure sale. That accounts for $100,000.

In addition, there's $63,000 – if you look at their accounting, which was only received by us yesterday, via FedEx, there's $63,000 being held by the receiver that represents security deposits. Also, if the Court reviews our papers, the Court will find that we believe that one of the reasons that the receiver had as much money as he had is, that the Debtor did not make the adequate protection payments that were ordered by the Court. It seems to me, that you can't refuse to make an adequate protection payment and then when we're in the context of a hearing like this [p. 7] say, well, you're now credited, therefore, your deficiency is fixed at X and we're entitled to recover our administrative claim against an asset that was really an adequate protection payment that should have been paid by this debtor and it wasn't paid by the Debtor. And now that would account for at least $65,000 of the funds that are being held by the receiver, if we take at face value the Debtor's contention that the property had a net operating income of $65,000 a month.

I think if you then do the arithmetic in terms of the amount of money that the Debtor could even arguably assert an interest in, it's a lot less than what Mr. Dew suggests.

Second, and more importantly, however, I think that Mr. Dew has taken the $10,000,000 credit bid, the ten million one determination as to value, and said, we're only entitled to recover an additional 100,000. We have a general unsecured claim in this case for over $3,000,000.

They attempted to argue that that should be disallowed. The Court denied that without comment. More importantly, we had a security interest, your Honor, in two assets, one was the real property that the Court determined had a value of $10,000,000 and the other was an interest in the rents. And I think that that security interest in the rents arises from two things; one, from the deed of trust itself, which is [p. 8] attached at page 105 of our supplemental papers. We – because the deed of trust is attached to the judicial foreclosure complaint. The deed of trust conveyed to us a separate security interest in the rents.

THE COURT: Not separate, sir. It's part of your deed of trust.

MR. MEYER: It's part of the deed of trust, but it's a different asset than the real property, your Honor.

THE COURT: Not so, sir

MR. MEYER: Then we have a different view, your Honor, because that is my – our position, and we think that Section 2938 of the Civil Code grants us that separate security interest as well. We've briefed that issue as best we can. If the Court has a different view, then the Court has a different view. But we don't think that the difference in the amount of the bid, compared to the determination of value establishes we're entitled to particularly – or the cap of what we're entitled to, particularly since most of it represents money that should have been paid over by Mr. Bibawi during the course of the Chapter 11 case. And I think until the numbers are recast, it would be inappropriate to allow Levene and Eisenberg a $100,000 chunk of that money. If the receiver is hold

$151,000 of pre-receivership funds and $63,000 of that represents security deposits, then we're under $90,000 And [p. 9] then if we look at what Mr. Bibawi should have turned over during the Chapter 11 case, we may down to about $30,000. think until we have closure on that issue – and that is also why we made our conditional objection to the motion to dismiss, would be inappropriate to have any amounts drawn out of the – with the funds that the receiver is withholding for any purpose for the Debtor or for its counsel.

As to the one-action rule, your Honor, we briefed that issue. If the Court has any comments I'll address them.

MR. DEW: Your Honor, if I may reply briefly.

On January 27th, we filed a declaration of Christopher Combs in support of the fee application that attached the receiver's report that we had received as Exhibit 1. That receiver's report is very clear and indicates that as of December 20, December 20, 1994, the amount in the receiver's account was $251,000. Thus, the $251,000 in the receiver's account pre-dates the foreclosure on the property. We're not talking about –

THE COURT: When was the foreclosure?

MR. DEW: December 22nd.

MR. MEYER: December 20th.

MR. DEW: December 20th.

Thus the 251,000, pre-dates the foreclosure on the [p. 10] property. It is not post-foreclosure rents. It's pre-foreclosure rents, number 1.

Number 2 – and the accounting is very clear. of the $251,000, $82,000 represented rents for the month of December, 1994, that's net cash flow for the month of December, 1994. 63,900 was security deposit. And $100,000 came from the prior receiver on the property. Thus, your Honor, none of these funds represent cash collateral not turned over. All of these were funds, either turned over by the first receiver, which pre-dates Gold Coast's acquisition of Cal Fed's loan, or security deposits, or money collected in the month of December.

MR. MEYER: Your Honor, could I be heard on that?

MR. DEW: If I could finish, your Honor.

MR. MEYER: Those numbers are simply wrong.

THE COURT: We'll come back to you, sir.

MR. DEW: Your Honor, we can go through it very clearly. It is Exhibit 1 to the declaration.

THE COURT: Okay, where do we see that in Exhibit 1?

MR. DEW: If we turn to a Bate stamp page seven of Exhibit 1, the first – the last digit is a seven. That's all that's legible on my copy in the lower right hand corner.

THE COURT: Okay.

[p. 11] MR. DEW: We're showing net cash flow $82,275. if we turn back to the previous page we can see that it says December, 1994. If we turn back to two pages before that we see that this report is prepared for the period November 23 through December 20th.

If we look at the month – back on page – Bate stamp page seven, we see cash flow of $82,275.

THE COURT: That's also year to date.

MR. DEW: Correct, because it is only one month for the period November 23rd to December 20th.

THE COURT: Okay, security deposits are almost 64,000.

MR. DEW: That is correct, your Honor. Now there is an issue on security deposits – I believe these are the funds that were turned over, $64,000, your Honor. And an additional $100,000 – owner one contribution – "owner one" I take to be Bradfarr Corporation's receiver. The first owner of the property. That results in $251,000. All predating the foreclosure. Obviously, the 64,000 has to be held as security deposits, but there is more than sufficient funds to pay $100,000 to Levene and Eisenberg.

THE COURT: $64,000 is held as security deposits and Gold Coast gets $100,000 on account of its secured claim, in addition to the $10,000,000 it bid at the sale, that leaves how much?

[p. 12] MR. DEW: Approximately 88,700, your Honor. That's the 82,275 – actually it's 87,700 less 1,625 plus 6,475 for a total of approximately 87,000, your Honor.

THE COURT: Minus 1625 plus how much?

MR. DEW: $82,275.40 less $1,625 for the tenant receivable plus $6475 for a total approximating eighty seven thousand seven hundred and fifty, I believe – actually it's less than that.

THE COURT: Plus five nineteen forty four, isn't it?

MR. DEW: Yes, plus five nineteen forty four plus $300.

THE COURT: That's a deposit again, isn't it?

MR. DEW: That is a deposit, your Honor.

THE COURT: So that wouldn't be included.

MR. DEW: I don't know what a remote control deposit is, your Honor, but let's leave that aside.

THE COURT: Eighty seven six forty four eighty four according to my arithmetic.

MR. DEW: I believe that's correct, your Honor.

THE COURT: Okay, anything further on the numbers?

MR. DEW: Not from my side, your Honor.

THE COURT: Okay, Mr. Meyer.

MR. MEYER: Your Honor, two facts. First of all, as of December 22, Mr. Astani had not received the money [p. 13] from the Bradfarr receiver. Page 36 of our papers, Exhibit G, indicates that I received that money on December 28th from the Bradfarr receiver and I transmitted it to Mr. Astani on that day. So that money was not being held by Mr. Astani at that time, as of December 22.

Second, I go back to the issue of adequate protection payments. If you look at page seven, that Mr. Dew had us looking at, your Honor, you can't say that the money that should have been paid in September, and during the

course of the case, and the December cash flow, is not our money. The Court had issued an order, on stipulation, actually, that this was our adequate protection payment. You can't say now that those payments were not made, in breech of and in violation of that order, that they can now draw out an administrative priority expense from those funds.

THE COURT: Let's suppose that the payments were made, and let's suppose that they were half a million dollars, that would reduce the principle by half a million dollars and you could only bid nine point five million at the sale.

MR. MEYER: I don't think that that would necessarily reduce the principle, your Honor. It could have been interest on ten million dollars. That was not resolved by this stipulation.

[p. 14] THE COURT: Interest accrue on an unsecured debt, does it after filing bankruptcy.

MR. MEYER: Adequate protection payments, your Honor, don't necessarily reduce the balance. Interest would not – interest might accrue on the ten million dollar balance, it wouldn't accrue on a thirteen million dollar debt.

THE COURT: I don't think interest accrues at all, sir.

MR. MEYER: Well these were added for protection payments, your Honor, and the –

THE COURT: So they have to be taken off of principle.

MR. MEYER: Well, if that's the Court's premise then I don't think that's ever been argued in this case. But we would argue that that's not the case. But even if it was taken off the principle, so what, we still argue that we had a separate security interest in the rents. We argue this owner contribution, which is in fact, what Mr. Bibawi was suppose to pay over to us, should have been over during the course of the Chapter 11 case. You can't now transmute it into something else, which is unencumbered funds. Those were rents in which we had for security interests. We argued that it was a separate security interest, the Court disagrees. But just because he violated the order, does not [p. 15] now mean that those funds are available to Mr. Dew's firm. And I don't think the numbers change that. And I think if you look through this and you figure out what we were suppose to obtain the amount that has to be held as security deposits, I think Mr. Dew's numbers are wrong because out of that $251,000, $182,000 should have been paid over to us as an adequate protection payment to the – pursuant to this Court's order. That would leave about seven some-odd thousand dollars of which $64,000 represents security deposits that have to be held for the tenants. That doesn't even take into account the Bradfarr receivership funds. And I would also point out, your Honor, as we did in our papers, with respect to the Bradfarr funds, that was litigated in the state court and we asked Mr. Dew if the Debtor and/or its counsel asserted an interest in those funds and they did not. So those funds, it seems to me, also represent our cash collateral and they don't have an interest in there and that's already been determined by the state court and that's why the Bradfarr receiver

turned over the funds over to us. And if you go through the numbers there aren't unencumbered funds except to the extent that Mr. Bibawi breached and violated the Court's adequate protection order.

MR. DEW: Your Honor, I must briefly respond. The interim statements and operating reports that have been filed, and of which Mr. Meyer has received a copy, show that [p. 16] all of the funds were turned over, pursuant to the Court order.

Allegations that they were not, are simply unfounded allegations with nothing in support. The interim statements and operating reports that Mr. Meyer has received, show that all of the funds were appropriately turned over.

The 100,000 we're talking about, is the 100,000 from the prior receiver. We're not talking about funds that were not properly turned over.

Your Honor, I think Mr. Meyer is simply trying to confuse the numbers in this situation, when the numbers are quite clear.

MR. MEYER: Your Honor, the $100,000 was not turned – first of all, the turnover by the prior receiver was the amount of $80,000, $80,500, or $80,700, and that turnover did not occur until December 28th.

To the extent that Mr. Dew is attempting to argue that the $100,000 owner contribution was out of those funds, he is absolutely wrong, because he is the one who is saying that the receiver's report is as of December 22. The receiver did not have the $80,000 of the money at the time of that report.

THE COURT: So, the receiver now has an extra $80,000 not included in this report?

[p. 17] MR. MEYER: That's correct, your Honor.

MR. DEW: All of which were rents collected prior to the foreclosure. So, your Honor, I guess the pie is now larger. Instead of being 250,000, it is now $330,000.

These are funds which were clearly rent collected approximately two years ago, not rents collected after the foreclosure sale. Rents collected by a receiver back in the year 1992 and 1993.

Thus, your Honor, now we have $330,000 we're dealing with, apparently, as opposed to $250,000, more than adequate to cover the security deposits. More than adequate to pay $100,000 to Levene and Eisenberg. More than adequate to pay unsecured claims, and more than adequate to pay a residual of approximately $100,000 to Gold Coast.

Your Honor, given that, I think that Levene and Eisenberg should be paid its full $100,000 out of these funds, not some lesser amount based on some convoluted math.

MR. MEYER: Your Honor, the math is not convoluted, and we do stand by our legal arguments with respect to whether that – those funds represent our collateral or our separate collateral, and are available for his legal fees.

But, we don't think the math is convoluted at all, and we think that most of that money represents funds that were supposed to have been turned over by Mr. Bibawi, in any [p. 18] case.

THE COURT: Okay. What I'm going to do is this. I'm allowing $100,000 as total fees and expenses. The Court finds that the payment – adequate protection payments that were made have to be applied to reduction of principle. That additional payments that should have been made, would have required the same treatment. And that inconsequence theory is at least $100,000 available for payment of the legal fees. And the Court authorizes the fees to be paid from that account.

MR. DEW: I'll prepare an order, your Honor.

THE COURT: Very well.

Now, are we ready to proceed with dismissal?

MR. DEW: Yes, your Honor. I do not believe there is an opposition to dismiss in light of the interim statements and operating reports that have been provided to Mr. Meyer. However, I would like him to address that point. That was the objection of Gold Coast, mainly that the interim statements and operating reports have not been provided.

MR. MEYER: Your Honor, the issue is not whether documents were prepared. The issue is whether Mr. Bibawi had accounted for the cash that came into this estate.

We have only had a few days to look at those. They were received last Wednesday afternoon. We have [p. 19] serious problems. We have looked at NSF checks that were written by the Debtor-in-possession. We don't think there's been a full and complete accounting, and we intend to pursue our rights and remedies against Mr. Bibawi for misappropriating our cash collateral.

We don't think there's been a reconciliation. There has, however, been a filing of all of the operating reports and interim statements, but that's all that has occurred. And they merely beg the question of how much money was misappropriated.

THE COURT: Okay. You're asking – What do you want the Court to do then? Shall we dismiss it, and you can proceed then in whatever forum, as appropriate, or do you want this case to continue?

MR. MEYER: We think the case should be continued, because we think that litigation should occur in this court.

MR. DEW: Your Honor, if I might make a suggestion. Perhaps the case could be dismissed, but the Court could retain jurisdiction over any action with regard to use of cash collateral.

THE COURT: Why don't we do it that way.

MR. MEYER: That's agreeable, your Honor.

MR. DEW: So we can avoid the fees and costs.

MR. MEYER: Sure.

THE COURT: All right. Okay. So, let's do it [p. 20] that way.

MR. DEW: Thank you very much, your Honor. We will submit an order on that as well.

MR. MEYER: Your Honor, we'd like to look at both orders before they get submitted.

THE COURT: Very well.

MR. DEW: That is not a problem.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

| | |
|---|---|
| /s/ L. L. Francisco | 6/16/95 |
| Transcriber | Date |

## EXHIBIT "G"

11 U.S.C. § 349(b) provides:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title –
>
> (1) reinstates –
>
> (A) any proceeding or custodianship superseded under section 543 of this title;
>
> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

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11 U.S.C. § 502(b) provides:

> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that –

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds –

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds –

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of –

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

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11 U.S.C. § 506(a) provides:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

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11 U.S.C. § 506(d) provides:

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –
>
> > (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
> >
> > (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

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11 U.S.C. § 552(b) provides:

> (b) (1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.
>
> (2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice

and a hearing and based on the equities of the case, orders otherwise.

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11 U.S.C. § 1111(b) provides:

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless –

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if –

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

> (2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

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Federal Rule of Bankruptcy Procedure 3012 provides:

> The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

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